Supreme Court, U. S.
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In the
Supreme Court of the United States

October Term, 1980

Docket No. _____

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Petitioners

against:

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, vice-chairperson, Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF ALL RESPONDENTS

Earl K. Madsen
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300
Counsel of Record for Respondents

City and County of Denver
Max P. Zall, City Attorney
Brian H. Goral, Stan M. Sharoff, and
Thomas A. Gilliam, Assistant City Attorneys
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Attorneys for Respondents

QUESTIONS PRESENTED

Expressed in the circumstances of this case, the questions presented are:

1. Did the Federal Courts below err in holding that Petitioner nurses had not proved any *prima facie* violation of Title VII, 42 U.S.C. §2000e-2(a)(1), by Respondents' use of the City's Pay Plan which paid to nurses employed by the City the prevailing labor market nursing rates of pay?

2. Did the Federal Courts below err in holding that Petitioner nurses had not proved any *prima facie* violation of Title VII, 42 U.S.C. §2000e-2(a)(1), assuming arguendo that the evidence showed nursing occupations held predominately by females were paid less in comparison with other genuinely different jobs (such as Real Estate Appraiser) held predominately by males in the City's employ which Petitioners assert to be of equal worth to the City?

3. Did the Federal Courts below err in requiring that Petitioner nurses must establish a Title VII, 42 U.S.C. §2000e-2(a)(1) sex discrimination in pay claim by proving that the City did promulgate a differential in pay based on sex for substantially equal work?

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OPINION BELOW

The opinion of Chief Judge Winner is not officially reported, but is reported at 17 FEP Cases 906 (1978), and is set forth verbatim in attached Appendix A, at A-1. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 620 F.2d 228 (1980), and is set forth verbatim in attached Appendix A at A-24.

Petitioners' statement suggests factual holdings adopted by the courts below but which Respondents believe were not made. The following brief summary of findings of fact actually made by the Federal Trial Court and relied upon by the United States Court of Appeals for the Tenth Circuit are presented, by reference to the attached Appendix pages where reported.

1. Congress under Title VII did not mandate that the job of every person in the United States be evaluated skillwise, productive wise and otherwise to the job of every other person, and that a new pay scale be set up by some group of experts. (A-8).
2. Petitioners' statistical evidence demonstrated that if there is discrimination in the nursing profession, it is in favor of females because females outnumber males by a tremendous percentage. (A-10).
3. No occupational discrimination against females was shown on the record made in this case. (A-10).
4. In establishing pay discrimination based on sex in comparisons of different jobs, Title VII requires that Plaintiffs must prove a differential in pay based on sex for performing equal work and the jobs need not be identical but must be substantially equal. (A-16).
5. There is no substantial evidence in this case that the tasks performed by any other job group, either as regular or as additional duties, involves substantially equal responsibility with those of the nurses. (A-18).

6. There has been no showing of discrimination at all between occupations performing substantially equal work. (A-18).
7. The City has not excluded any male from the profession of nursing based upon sex, and the City has not excluded any female from any other occupation based upon sex, and the City has made no determination as to the wages of any group based upon sex. (A-19).
8. The City fixed its wages based upon a conclusively demonstrated legitimate reason, meeting competition, that is paying prevailing labor market rates. (A-13, 20).
9. There is no credible evidence in the case that the City does not afford Plaintiffs and all other females equal opportunities in employment on the basis of fitness and without discrimination because of race, color, religion, sex or national origin. (A-21). Title VII requires removal of artificial, arbitrary and unnecessary barriers to employment which discriminates on the basis of impermissible classification, but no such discrimination is found in the record in this case. (A-21).
10. Title VII does not permit establishment of a *prima facie* violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. (A-22).
11. The City's Key Class System was established after careful study, thought and evaluation by experts in the field and the City in setting up the system in good faith attempted to fix wages for genuinely different work classifications. (A-22).
12. Plaintiffs have not proven any grounds for relief in this case. (A-23).

STATEMENT OF THE CASE

Respondents believe Petitioners' statement to be inaccurate and insufficient and therefore supply this statement.

In these proceedings, a certified class of female registered and licensed practical nurses employed and to be employed by the City and County of Denver sought to invalidate the merit employment and pay system of the City. The core components of the City's merit system are imposed by City Charter and are as follows:

(1) That the City shall compensate its employees with pay equal to generally prevailing rates in the community, and
(2) That the City shall provide employees like pay for like work.[1]

The Petitioner nurses claimed below that 600 years of history of "occupational segregation" forced women into limited occupations, the nursing occupation being one of them. They claimed that as a result, the nursing occupation received lower pay than other "professional" occupations held predominately by men. The nurses then claimed that when the City performed local, regional and/or national nursing labor market pay surveys to pay nurses employed by the City the "prevailing" rates for such nursing positions in those labor markets that this

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[1]The Federal Government has adopted the substantially identical pay standards, that Federal employees must be paid on the principles of equal pay for substantially equal work, and that Federal pay rates must be comparable with private enterprise pay rates for the work involved. Federal Pay Comparability Act of 1970, 5 U.S.C. §5301. It cannot be argued that Congress, in enacting Title VII, outlawed a meeting competition, prevailing wage program such as the City of Denver's, but expressly mandated its use in Federal employment. See *Espinoza v. Farah Mfg. Co.*, 424 U.S. 86, 90, 94 S. Ct. 334, 38 L.Ed. 2d 287 (1973).

perpetuated the claimed historical discrimination against women.

These contentions, among others, were contained in the nurses 32 page Complaint, which was also based on the Fourteenth Amendment to the United States Constitution (Equal Protection Clause), and in conjunction therewith 42 U.S.C. §1983, and also Title VII of the Federal Civil Rights Act of 1964, as amended.

The City answered the Complaint denying these Complaint allegations. The City also defended, *inter alia,* on the ground that the City employment and pay system was a non-discriminatory merit system, not gender based, following the City Charter provisions which required that pay rates, including fringe benefits, be equal to generally prevailing community rates and provide like pay for like work.

While the Petitioner nurses initially argued that the City's classification and pay plan was vague, arbitrary and resulted in improper internal classifications within nursing occupations, this claim was dropped by them at the close of their case based on the record evidence. The nurses then stated that they accepted the City's classification of internal relationships within nursing classes, with this testimony on cross-examination of the lead nurse plaintiff:

Q. Do I now understand your testimony, Mrs. Cady, that the nurses are now accepting internal relationships among the nurses at the Career Service Authority as established, with the exception of the LPN?

A. That is correct.

Q. And so that is no longer really an issue in the case, is it then, the internal classification of the nurses by the Career Service Authority?

A. Not from nurse to nurse, no.

Q. And, really, the only issue here you are now asserting in these exhibits this morning is that the nurses should be taken into the general administrative series and should not be compared with the rates for equal work in the labor market of nurses?

A. Of nurses, that is correct (App. II, p. 396).[2]

Nurse Cady testified further on cross examination that the nurses wanted to be paid similar to other occupations, including that of real estate appraiser (App. II, pp. 397-399).

The Pay Plan of The City.

In 1954, the citizens of Denver adopted a City Charter Amendment which called for a new method of determining pay rates for City employees. This Amendment provided for payment of rates equal to prevailing rates in the community and required that the City establish a classification and pay plan for all positions in the municipal employment, based upon the duties of the positions.

This Amendment created a Career Service Authority to be directed by a five member Career Service Board to execute the provisions of the Charter relating to personnel management including administration of the pay plan for the City. The purpose of adopting the merit pay and employment program by the City was to abolish the "spoils system" in City employment. *Fallon v. Nicholson,* 136 Colo. 238, 316 P.2d 105 (1957).

The City then developed and utilized the "position classification method" as its classification system, which is one of the most widely accepted classification

[2]"App." and roman numeral refers to the volume of the appendix below, and to the page of that volume.

methods and is used by a majority of government jurisdictions.

There are approximately 800 different job classes in the system of the City and County of Denver. After these jobs have been classified in the City classification plan, it is then the function of the Denver Career Service Authority to undertake pay surveys to determine the pay ranges to be paid for the particular job classification. The amount of compensation depends upon the compensation paid for an equal position in the public and private employment sector of the relevant labor market.

The job classes to be surveyed for pay purposes each year are called "key classes." They serve as bench marks which are relied upon to establish the pay grade for classes of public employment. For purposes of the instant litigation, in the 1977 pay survey, there were thirty-one key classes used. Nineteen of the classes were in the "general" survey, and twelve were in the "health" survey. The prevailing rate is determined using actual rates paid employees in the key class in the community. Key classes in the general 1977 survey included Accountant I, Attorney I, Civil Engineer I, Civil Engineer IV, Custodial Worker I, Draftman II, Heavy Equipment Operator, among others. The twelve key classes in "health" series were broken down into a Denver metro survey and a national survey. The Denver survey health key classes were Dietician I, Graduate Nurse I, Health and Hospitals Control, Hospital Attendant I, Licensed Practical Nurse I, Medical Technologist I, Pharmacist I, Physical Therapist I and Radiologic Technician I. The three classes selected for national survey in the health field were Physician I, Director of Medicine, Director of Surgical Service.

The Career Service Authority conducts wage surveys to determine prevailing rates generally once a year. The general (non-health) survey is conducted in

June and July, and is used to determine the pay of approximately 6000 Denver employees. The health survey is conducted in January and February of the following year and covers approximately 1800 employees. These survey data are tabulated using an interquartile range formula. This means that the lowest and highest quartile rates are excluded from calculation to determine the prevailing rate for the job classification involved, since the high and low might unduly distort the rates.

In the position classification or key class system, only the key classes had their pay rate determined directly from the community pay surveys. The majority of classes are not key classes, and are assigned a pay rate on the basis of their direct or indirect relationship to one or more of the key classes. The Career Service Authority rules require that non-key classes must be related to the key classes in order that their pay may be determined consistent with the Charter Amendment requiring like pay for like work. Under the position classification system, the professional staff must analyze jobs by comparing all the job qualifications and duties set forth in the class specifications.

For the key class system to work, Career Service Authority rules require that the key class must be well known and commonly understood, susceptible to clear, concise description, found in reasonable numbers in the municipal service and also in outside employment in the public and private sector, and provide a good reference point upon which to base pay rates for related classes.

Certain middle management administrative and professional job classifications, however, did not meet those key class survey standards set forth in the Career Service Authority rules. These occupations occurred in only small numbers in the labor market, and then only in larger business establishments and governmental

agencies. To overcome this survey problem, a special survey was made, termed the General Administrative Series. In this series, four middle management administrative positions — Personnel Technician, Buyer, Management Analyst, and Budget Analyst — are surveyed separately from the key class survey. This was done to avoid the distortions which could result from use of the key class system for such small numbers, which could unduly affect the resulting pay conclusion for these administrative classifications, upward or downward.

All City jobs have their pay determined by the same basic method. This includes professional and nonprofessional job categories. Occupations in the more limited and special General Administrative Series, as explained above, are also paid on the same basis of a survey in the labor market for the four middle management administrative positions noted.

The Petitioner nurses requested that their pay be determined by reference to these middle administrative positions in the General Administrative Survey for non-nursing occupations, including real estate appraiser, and not by comparison to the prevailing rate for nursing occupations in the labor market.

SUMMARY OF ARGUMENT

1. The District Court For The District Of Colorado And The Tenth Circuit Court of Appeals considered evidence of good faith on the issue of discriminatory intent based on the Petitioners' claims against the individual City officials under the Equal Protection Clause of the Fourteenth Amendment to the Constitution and 42 U.S.C. §1983, claims not asserted in the Petition for Certiorari.

2. The District Court For The District of Colorado and the Tenth Circuit Court of Appeals after Petitioners

had presented their evidence purporting to show discriminatory treatment, correctly held that Petitioners had not shown any arbitrary barriers to either the employment of nurses or any other employment of persons under the City's merit classification and pay plan, and properly held that the nurses had not proved any *prima facie* violation of Title VII.

3. The District Court For The District of Colorado and the Tenth Circuit Court of Appeals correctly held that a claim of pay discrimination based on sex must be proved on the basis of a differential in pay for the performance of substantially equal work, and the Federal Circuit Courts of Appeal are in accord in the application of this standard to pay discrimination cases.

ARGUMENT

1. The Federal Courts Below Did Not Hold That Proof Of Overt Discriminatory Intent Must Be Shown To Prove A *Prima Facie* Case Under Title VII, But Instead Properly Considered Evidence Of Good Faith And Lack Of Discriminatory Intent Concerning Petitioners' Claims Against City Officials Under 42 U.S.C. §1983 And The Fourteenth Amendment (Equal Protection Clause) To The United States Constitution.

Chief Judge Winner ruled in his opinion that the Plaintiffs' Complaint stated a claim for relief under the Fourteenth Amendment and 42 U.S.C. §1983 with respect to the officials. As was clearly set forth in this Court's opinion in *Washington v. Davis,* 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed. 2d 597 (1976), proof of discriminatory intent is required in establishing a case under the Equal Protection Clause of the Fourteenth Amendment. All counsel in the trial below agreed that "some type of proof of discriminatory intent is now required of Plaintiffs in their §1983 and Fourteenth Amendment claims." See

Plaintiffs' Trial Brief on liability issues p. III, B., App. I, p. 62. Judge Winner in his opinion below see App. A-4, held that under the Equal Protection Clause and 42 U.S.C. §1983 claims, there is "not a scintilla of evidence that the City officials have done anything other than act in total and complete good faith . . . ."

The issue of good faith in the actions of City officials was not appealed to the Tenth Circuit by Petitioners. There is no discussion in the opinion of the United States Court of Appeals for the Tenth Circuit in this proceeding concerning proof of discriminatory intent as Petitioners' initial burden of proof in a Title VII case. The constitutional claims raised in the District Court below which require proof of overt discriminatory intent are not involved in this Petition for Certiorari. See the opinion of the Court of Appeals below, App. A.

2. Both Federal Courts Here Correctly Held That The City's Pay Plan Which Paid To Nurses Employed By The City Pay Rates Equal To Generally Prevailing Rates In The Community Labor Markets For Substantially Equal Nursing Jobs Was Not Discriminatory Under Title VII, And That Petitioners Therefore Failed To Establish A *Prima Facie* Violation Of That Act.

A. Plaintiffs Presented Their Case As A Discriminatory Treatment Case Under *McDonnell Douglas,* And That Test Was Correctly Applied.

B. Petitioners Did Not Prove Any Artificial, Arbitrary And Unnecessary Barriers To Employment Calling For Application Of The Disparate Impact Test, Which Test Has Never Been Applied To Claim Of Pay Discrimination Under Title VII.

The nurses made it clear in their Complaint that they were complaining of alleged disparate pay treatment, as is set forth in Section IX, Paragraph 32, that

"disparate treatment" to nurses as against "males similarly situated in terms of job characterization" is the result of the City's Pay Plan. See App. I, p. 24. Following up this Complaint allegation, the Plaintiffs' proof consisted in part of purported pay differentials based on exhibits allegedly showing nurses were treated less favorably when compared to males, in a host of charts, Ex. 85-130, Ex. App. II and III. Each of these exhibits, on the first page of back-up materials for same, referred to the "differential treatment" that the nurses received in comparing median salaries with certain other non-nursing, allegedly male dominated occupations. These Complaint allegations and the Plaintiffs' own evidence showed the Plaintiffs' case under the disparate treatment theory of *McDonnell Douglas Corp. v. Green,* 422 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). It should be clearly noted that the nurses expert, Dr. Bardwell, was forced to admit that in preparing all of these charts, any male dominated job class meeting the definitions stated in the exhibits, but which were paid the same or less than the allegedly equivalent or similar nursing position, had been carefully and deliberately excluded by the nurses from their charts. (App. II, p. 407, 409). Counsel for the nurses on conducting redirect examination of the nurses' expert, Dr. Bardwell, then advised the Court that counsel was not proposing that the Court was to use the exhibits for any purpose in making a pay scale (App. II, p. 410). As evidence, the charts were worthless.

The same kind of selfserving documentation was advanced in the other base exhibits of the nurses below. The nurses prepared Exhibits 1 through 75, Ex. App. I pp. 126-127, allegedly to show that the City clustered nurse jobs into one basis for a comparison based on educational requirements which was not true for male jobs. Again, the nurses argued that this was evidence of "disparate treatment". These charts consisted of educational codes by color. A yellow color was shown for one year or less

formal post high school education (for Licensed Practical Nurses); a green color for two to three years of formal post high school education (Graduate Nurse I); a blue color for four years' formal post high school education (Graduate Nurse III, Public Health Nurse I); an orange color for five years' formal post high school education (Public Health Nurse IV and V for example); and a purple color for six years or more post high school education. The purpose of these charts was to show in the female dominated nursing occupations, a rainbow of colors would be displayed on the charts, but for other "professional" occupations, some of which were dominated by males, more single colors would be shown. The effect of these color coding charts was that years of post high school education ranging from one through five years would be shown in an array of colors, namely, yellow, green, blue, and orange, and these correlated with basic educational requirements for nursing positions.

However, when education in male dominated occupations such as attorney and physician would show up on the Plaintiffs' charts, with wide ranging educational requirements going from seven years for the lawyer to thirteen years for some physicians, these multiple years of education were encompassed in a single color (purple). The nurses' own expert economist, Mrs. Bergmann, was moved to comment on reviewing the charts that "certainly there are various ways of making this chart" (App. II, p. 357). These charts advanced to show "disparate treatment" similarly fail to provide evidence of any *prima facie* violation under Title VII. In fact, the charts were not evidence of discrimination at all.

Lastly, in this context, the nurses introduced testimony from a Dr. Beatty, regarding a job evaluation of the City's Pay Plan and classifications performed by himself and two student assistants. The nurses argued that this study showed male classes of equal job worth to female classes were discriminatorily treated — paid more

(App. I, p. 77). Dr. Beatty testified that in his entire career he had performed only three job evaluation projects. He could not state any one text book serving as a source of his job factors analysis for his study. He admitted other factors could be used. He admitted his system was not validated with any other system used in the profession, nor against job duties performed in the City. He admitted he and his "staff" of two student assistants came close to "fist fights" in disputes on assigning points to his factors (App. II, p. 250). He testified that the point factor system used had never been used before, anywhere, at any time, by anyone, including himself (App. II, p. 249). He could not define what "job worth" was in his system, but he testified it was not a dollar measure, not an economic measure, not a sociological measure and not an artistic measure (App. II, p. 259).

Dr. Beatty testified that sex was the only explanation he could find for a salary disparity between unrelated City jobs showing the same job worth points through his system. However, on cross examination he testified that he would not be surprised to find in his study that male jobs had greater job worth points than female jobs in the City (App. II, pp. 251-252). Dr. Beatty answered on cross examination that the City 100% male jobs are higher value jobs than 100% dominated female jobs and this could explain why males are paid more than females in his own job worth analysis. (App. II, p. 254). Finally, when asked on cross examination if this would be a factor other than sex which would explain the salary differentials for wholly unrelated jobs as found by him, Dr. Beatty reluctantly admitted "true" (App. II, p. 256).

The evidence asserted to show disparate treatment thus was not probative evidence at all and could not and was not relied upon by the Court to prove any *prima facie* violation of Title VII. Yet this evidence was clearly advanced to show the Plaintiffs' theory of "disparate treatment" in their Complaint and exhibits.

Chief Judge Winner clearly responded to the Plaintiffs' theory of their case in applying the method of proof of *McDonnell Douglas v. Green, supra* (see A-12). Judge Winner held that the Plaintiffs had not proved a *prima facie* case and specifically commented that if the Plaintiffs proved anything, it was that discrimination within the nursing profession is in favor of females. (A-10). However, Judge Winner in discussing this matter stated that even if the record were viewed as one in which the Plaintiffs met their initial floating burden under *McDonnell Douglas Corp. v. Green, supra,* the City clearly showed its good faith effort to establish a fair pay plan and that it was paying the prevailing wage as required under the City Charter (see A-12). This evidence was clearly relevant for the Court to consider, see *Furnco Const. Corp. v. Waters,* 438 U.S. 567, 579-580, 98 S.Ct. 2943, 57 L.Ed. 2d 957, 969 (1978). Once the City demonstrated a legitimate ground for its conduct, then the burden would shift back under the *McDonnell Douglas v. Green, supra* method of proof to the Plaintiffs to show pretext, and this could not be accomplished if the evidence in fact showed that the City in good faith established its pay plan. However, this is not a holding that a Title VII plaintiff must initially prove discriminatory intent to establish a *prima facie* case, as Petitioners seem to suggest at page 6 of the Petition. The decision of the Court on this point was clearly correct under the applicable standards set down by this Court.

Petitioners apparently assert that the Courts below erred in not applying a disparate impact test of discrimination to the instant pay claim, following the analysis in this Court's decision in *Griggs v. Duke Power Co.,* 401 U.S. 424 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). As Chief Judge Winner correctly noted in his decision, the policy behind Title VII as described by this Court in its *Griggs, supra* decision is a removal of artificial, arbitrary

and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. (A-21). See also Schlei & Grossman, *Employment Discrimination Law*, p. 73, 1976 (BNA). Judge Winner and the Court of Appeals both expressly found that the City does afford Plaintiffs and all other females equal opportunities in employment on the basis of fitness and without discrimination (A-21, A-28). The disparate impact analysis set forth in this Court's *Griggs* decision is not applicable. The decisions below are clearly correct.

The *Griggs* case, *supra*, measured exclusionary standards such as a general intelligence test which disqualified Negroes at a substantially higher rate than white job applicants under §703(a)(2) of Title VII U.S.C. §2000e-2(a)(2), that is, an employment practice to limit, segregate, or classify employees in a way to deprive them of employment opportunity. This Court has measured alleged discriminatory pay in fringe benefit practices under §703(a)(1) of the Act, 42 U.S.C. §2000e-2(a)(1). *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed. 2d 343 (1976); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed. 2d 356 (1977) and *Board of Trustees v. Sweeney*, 439 U.S. 24 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978).

3. The Federal Courts Below Correctly Held That To Establish A Sex Based Pay Discrimination Claim Under Title VII, Any Comparison Of Occupational Rates Must Be Based Upon A Showing Of A Differential In Pay Based On Sex For Performance Of Substantially Equal Work And There Is No Conflict In The Decisions Of Federal Circuit Courts of Appeal On This Issue.

The Federal Courts of Appeal which have considered the issue have all ruled that claims of discrimination in pay based on job comparisons under Title VII must be

based on comparison of substantially equal work. These cases are *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977); *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 (4th Cir. 1977) cert. denied, 434 U.S. 904 (1977); and particularly decisions in the Tenth Circuit, *Ammons v. Zia Co.,* 448 F.2d 117 (10th Cir. 1971); *Fitzgerald v. Sirloin Stockade Inc.,* _____ F.2d _____, 22 FEP Cases 262 (10th Cir. 1980), and the instant decision in *Lemons, et al v. City and County of Denver, et al.,* 620 F.2d 228 (10th Cir. 1980). See also *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429 (D.C. Cir. 1976). In a recent decision, the Federal Court of Appeals for the Ninth Circuit has in dicta concurred with this view on any pay comparison claims under Title VII. *Gunther v. County of Washington,* _____ F.2d _____ , 22 FEP cases 1650 (9th Cir. 1980, on rehearing).

In the *Christensen v. State of Iowa, supra* decision, a class of female clerical employees at the University of Northern Iowa brought a Title VII action against the Board of Regents contending that the University's practice of paying clerical workers (exclusively female) less than the amount it paid physical plant workers (predominately male) for jobs of "equal value" to the university was illegal sex discrimination and compensation. The University had undertaken a pay classification and compensation plan which provided job worth points for various jobs in the University's system. Because the local labor market paid higher wages for physical plant jobs than the beginning pay for such jobs in the system, the University had to modify the system to provide for advanced step starting pay for many physical plant employees. This resulted in some physical plant employees (males) continuously being paid more than clerical employees, even though they were in jobs having the same labor grade and with equivalent seniority as clerical employees. In *Christensen,* the court of appeals simply held that the plaintiffs had not proved a *prima*

facie violation of Title VII, in that the Federal Act did not abrogate the law of supply and demand, and that an employer paying to its employees rates of pay based on competitive rates of pay in the labor market did not violate Title VII. The court in *Christensen* did not reach the issue of the Bennett Amendment concerning Title VII.

In the *Keyes* case, *supra,* the Fourth Circuit similarly held that while the evidence in that case revealed the average male faculty salary was higher than the average female faculty salary, there was no showing of any salary differential for teaching positions which were substantially equal. The court pointed out that the plaintiff's statistical evidence made no comparison of salaries discipline by discipline or department by department. The Court of Appeals held that the plaintiff had failed to prove a *prima facie* case. 552 F.2d at 580. Like *Christensen, supra,* the *Keyes* case did not formally reach the issue of applicability of the Bennett Amendment set forth in 42 U.S.C. §2000e-2(h).

The United States Court of Appeals for the Tenth Circuit in *Ammons v. Zia Co., supra,* considered the claim of a female employee that the company violated Title VII by paying her less than certain male employees employed in the same section of the company. The Court held that to establish a case of pay discrimination under Title VII, one must prove a deferential of pay based on sex for performing substantially equal work. The Court then further commented that since the plaintiff's evidence did not show that the plaintiff was paid at a rate less than the rate at which the employer paid wages to employees of the opposite sex for substantially equal work, that a *prima facie* case had not been made out. Finally, the Court pointed out that since the plaintiff had failed to sustain her burden of proof, it did not become necessary for the Court to meet the question whether the

company would have been justified in adopting one of the affirmative defenses from the Equal Pay Act, 29 U.S.C. §206(d)(1)(iv) to establish a pay differential based on another factor than sex. See 448 F.2d at 120. Since the Court found no differential in pay based on sex for the performance of substantially equal work, the affirmative defenses set forth in the Equal Pay Act under the Bennett Amendment as set forth above were not applicable.

Subsequently, in the case of *Fitzgerald v. Sirloin Stockade, supra,* the United States Court of Appeals for the Tenth Circuit held that the employer had discriminatorily refused to promote the female plaintiff to a series of positions in violation of Title VII. For this discrimination the court held the plaintiff must receive compensation in lost pay measured by existing rates paid by the company to male employees for the same jobs in question. Matters concerning the Bennett Amendment were not even briefed and presented to the court in the *Sirloin Stockade* case. Thus the court in that case did not have before it any legislative history of the Equal Pay Act and Title VII; nor briefing on the fact that the Equal Pay Act affirmative defenses were already incorporated into Title VII by the first sentence of §703(h) before the Bennett Amendment was added in the second sentence of §703(h). See *General Electric Co. v. Gilbert, supra,* 429 U.S. at 143-144. The court's decision in *Sirloin Stockade* is fully consistent with its previous decision in *Ammons v. Zia Co., supra,* and the instant case of *Lemons, et al., v. City and County of Denver, et al.* The same result would obtain under either the Equal Pay Act or Title VII. Of course, the instant *Lemons, et al v. City of Denver, et al,* case follows *Ammons v. Zia* with respect to the equal work standard required to prove a *prima facie* pay comparison discrimination case under Title VII. This Court should know that Judge Barrett participated as a member of the panel of the United States Court of Appeals for the Tenth Circuit on both *Ammons v. Zia Co.,*

supra and *Fitzgerald v. Sirloin Stockade, Inc., supra* and the *Ammons* decision is not even cited in *Sirloin Stockade, Inc.* because of the different nature of the fundamental claim raised in *Sirloin Stockade.*

In the *Gunther v. County of Washington* decision, on rehearing, the Ninth Circuit Court of Appeals pointed out that while it had a different point of view on the Bennett Amendment than had been asserted by some parties in that proceeding that nevertheless:

> Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a *prima facie* case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. 22 FEP Cases at 1654-55.

These views are in accord with the instant case. Compare that Court's earlier views of the Bennett Amendment in *Manhart v. City of Los Angeles Department of Water and Power,* 553 F.2d 581 (9th Cir. 1977), aff'd in part and rev'd in part on other grounds, 435 U.S. 701 (1978). Those views were also fully consistent with the instant judgments below.

Also, in *Laffey v. Northwest Airlines, Inc., supra,* the action was brought by stewardesses of the airline under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 as amended, claiming that female stewardesses were paid less than male pursers for performing essentially equal duties and responsibilities. The Court of Appeals for the Ninth Circuit agreed as follows:

> The Equal Pay Act's ban on sex-based discrimination in pay is largely paralleled by Title VII's

> condemnation of "discriminat[ion] against any individual with respect to compensation . . . because of such individual's . . . sex. . . ." So it is that NWA's policy of rewarding stewardesses unequally for work equal to that of pursers, which we have just confirmed as an Equal Pay Act violation, meets a similar fate under Title VII. The district court so held, and in its judgment directs back pay under Title VII to each shortchanged employee for any period that is non-recoverable under the Equal Pay Act. Remedies aside, we face no further Equal Pay Act problem as to stewardesses salaries. 567 F.2d at 453-454.

Earlier in its opinion, the Court of Appeals for the Ninth Circuit in *Laffey, supra,* held that Title VII and the Equal Pay Act must be construed in *pari materia,* and that Title VII refers specifically to the Equal Pay Act. See 567 F.2d at 446. The Court then stated that once a sex predicated wage differential is shown, it is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act. See again at 446. This is fully consistent with the Tenth Circuit's decision in *Ammons Co. v. Zia Co., supra* and the instant judgments below.

The Third Circuit recently, *in dicta,* indicated it had a different view, based on the circumstances of that case, with respect to the Title VII incorporation of any equal work standard. *I.U.E., et al. v. Westinghouse Electric Corp.,* _____ F.2d _____, nos. 79-1893 and 79-1894 (all references to slip opinion). The Court followed an allegation of a history of intentional sex based pay differentials and expressly relied upon that allegation to distinguish its holding from the instant case, *Lemons v. Denver* (10th Cir.), p. 29. In the *I.U.E., et al. v. Westinghouse,* case, *supra,* the Third Circuit pointed out

the allegation that the Company historically had followed sex segregated job classifications determined explicitly by gender of employees (p. 8), and had continued a practice of reducing the pay grade of female classifications below that of male classifications (pp. 8-9), even though the work in the classifications was different. No such claim was raised nor of course found in the instant case.

After analysis, the cases asserted by Petitioner to be "contrary holdings" to the judgments below herein are not in conflict with the instant judgments at all. But it must also be noted, the judgments below are squarely in accord with decisions of this Court.

In *General Electric Co. v. Gilbert, supra,* this Court measured a claim of sex discrimination in disability benefits arising from pregnancy under Title VII, Section 703(a)(1), 42 U.S.C. §2000e-(2)(a)(1), and held that Congress in enacting Title VII paid attention to the provisions of the Equal Pay Act. This Court's opinion at 429 U.S. 143-144, noted that Congress "paid especial attention to the provisions of the Equal Pay Act" when Congress amended §703(h), 42 U.S.C. §2000e-2(h). That amendment, the Bennett Amendment as this Court noted there, was set forth in one sentence, now the last sentence in §2000e-2(h), to make clear that differences in treatment in industrial benefits, among other items, may continue. This Court then commented that because of this amendment, "interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well . . . ." That section of the Equal Pay Act incorporates the "equal work" standard.

In this regard, this Court then cited an interpretative regulation (29 C.F.R. §800.116(d), 1975) promulgated by the Wage and Hour Administrator under the Equal Pay Act which interpreted the core "equal pay for equal work" standard of the Equal Pay Act, and not merely one of that Act's subsequently listed affirmative defenses. This

Court's action in the case of *General Electric Co. v. Gilbert, supra* has thus set the standard for the Federal Circuit Courts of Appeal to follow. The United States Court of Appeals for the Tenth Circuit in the instant case *Lemons, et al v. City of Denver, et al.*, has correctly followed that standard.

In this case, the Court of Appeals (see App. A, p. 24 *et seq.*) simply addressed in a straight forward manner the basic issue that the Plaintiffs raised on their appeal. That issue was the argument of the nurses that they historically have been underpaid because their work has not been properly recognized in the labor market, and because nurses have almost universally been women. Thus they urge that the City should not mirror this condition which prevails in the labor market and perpetuate it in City pay practices. Plaintiffs thus assert their nursing positions should be compared for pay purposes only with jobs other than nursing jobs by placing them in a different, non-nursing, City classification described as "General Administrative Series". Under their analysis, this would remedy the situation by making the comparison with non-nursing positions rather than nursing positions in the labor market. But the Court of Appeals rejected that argument stating that the Court did not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications, citing *Christensen v. State of Iowa, supra*. See App. A-26.

The Court of Appeals below held that it could consider wage discrimination claims involving departures from equal pay for equal work under both the Equal Pay Act and Title VII. The Court pointed out in its earlier decision in *Ammons v. Zia Co., supra*, it had applied the "equal work" concept to Title VII. The Court notes this concept of equal pay for "comparable work" concept had been rejected by Congress in favor of "equal

work concept." This decision is in square concurrence with this Court's decision in *General Electric Co. v. Gilbert, supra.* The decision of the United States Court of Appeals below in this matter was clearly correct.

CONCLUSION

As set forth herein, the Petition for Writ of Certiorari fails to supply any sufficient grounds or important reasons warranting review by this Honorable Court of the judgments below within the meaning of Rule 17, Rules of the United States Supreme Court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By _____
Earl K. Madsen
1717 Washington Avenue
Golden, Colorado 80401
Attorneys for Respondents

City and County of Denver
Max P. Zall, City Attorney
Brian H. Goral, Stan M. Sharoff, and
Thomas A. Gilliam, Assistant City Attorneys
353 City and County Building
Denver, Colorado 80202

August 21, 1980

Appendix A

Opinion of the District Court
(Dated April 28, 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

76 W 1156

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Plaintiffs,

against

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, vice-chairperson, Career Service Board, RICHARD L. HARTMAN, member of the Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver,

Defendants.

This case is a case certainly of substantial importance to the plaintiffs. it is a case of substantial importance to the taxpayers of the City and County of Denver. it is a case of substantial importance to the entire community, it is a case which is pregnant with the possibilty of disrupting the entire economic system of the United States of America. The case is one which states an unusual approach to employment of rates of pay. It's been a very interesting case. It's been a very well prepared case, it's been a very well presented case. Counsel seem more than happy to wind up their part of the case here today, and despite what I have said before, if they don't want to wait for the Supreme Court to make its guesses on *Bakke,* that's all right with me. I'm going ahead. I can decide the case today, too. If they can argue it, I can decide it.

Accordingly, these will be the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure, but I shall adopt the procedure typically followed by Judge Sherman Christensen, and the oral findings that I make here today will be subject to grammatical corrections, editing and additions or omissions or improvement after I receive the Court Reporter's transcript. I shall not write any opinion, but when I receive the Court Reporter's transcript, I shall edit it, correct it, file it, and Counsel will be mailed a copy of the corrected Reporter's transcript.

The findings and conclusions will be effective for purposes of appeal when the edited and corrected reporter's transcript is filed with the Clerk of the Court, and that will give counsel a basis for their appeal.

The complaint here recites as to jurisdiction that the action is one seeking a declaratory judgment, injunctive relief and damages. It asserts that jurisdiction rests upon the Fourteenth Amendment of the Constitution of the United States, 42 United States Code Section 1983, and 42 United States Code, Section 2000(e).

Of course, collaterally to that, jurisdiction rests on 28 United States Code, Section 1343 and 42 United States Code, Section 2000 (b).

It's probably well to have in the record what the pertinent portion of those jurisdictional provisions are. The Fourteenth Amendment of the Constitution of the United States is rather lengthy, of course, but the portion of it on which I understand the plaintiffs rely here is Section 1 of the Fourteenth Amendment and, more particularly, the clause, "No state shall make or enforce any law which shall abridge the privileges of immunity of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

I believe, and I expressly find, that the plaintiffs have stated a claim for relief under the Fourteenth Amendment, and I expressly find that I have jurisdiction of the claim made under the Fourteenth Amendment to the Constitution of the United States.

Next I come briefly, once more, to 42 United States Code, Section 1983. I have covered this before but it's probably well to have it again in the course of the findings.

I expressly find that under the principles of the *City* of *Kenosha v. Bruno,* 412 U.S. 507, and *Monroe v. Pape,* the predecessor case to *Kenosha v. Bruno*; (and *Monroe v. Pape* is to be found at 365 U.S. 167) there is absolutely no claim under 42 United States Code, Section 1983 available to the plaintiffs or to anyone else against a municipal corporation, the City and County of Denver; there is no claim for damages, there is no claim for injunctive relief. That will remain so unless and until the Supreme Court changes its mind.

I find expressly that there is no claim for damages against the City officials under 42 United States Code, Sec-

tion 1983 under the principles of *Procunier v. Navarette*, 46 Law Week 4144, and I find that the principles of *Wood v. Strickland*, 420 U.S. 308, preclude any possible action for damages against the City officials because, as I have heretofore found and as I reiterate, there is not a scintilla of evidence that the City officials have done anything other than act in total and complete good faith, and under plaintiffs' own theory in this case, it can hardly be contended that the City officials can be thought to have knowingly violated some well-established constitutional right.

Accordingly, I have no hesitancy in finding that under those cases there is no possibility of a damage claim against the City officials under Section 1983.

I have said that I will assume that there is an available remedy under 42 United States Code, Section 1983 against the City officials as individuals for injunctive relief and I do make that ruling for the purposes of, and only for the purposes of, this case. That ruling by me is not to be construed as any determination that I would make a similar ruling in a future case. It is not to be cited to any other judge of this court as a ruling by me on that subject, save and except as a ruling to become the law of this case. I decide that without intending to create any precedent whatsoever on the point and I do not want what I have said to be construed as precedent on that point for any future case. The reason I am doing this I am sure will become more apparent as I go along.

Additionally, the plaintiffs seek to recover under 42 United States Code, Section 2000 (e) which provides in pertinent part:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or priv-

ileges of employment because of such individual's race, color, religion, sex or national origin."

There is not any doubt at all that I have jurisdiction of this case under 42 United States Code, Section 2000 (e) and I expressly find and conclude that I do have jurisdiction of this case under 42 United States Code, Section 2000 (e).

The plaintiffs have expressly, emphatically and repeatedly abandoned any claim at all under the Equal Pay Act. I have not the slightest doubt but that I would have had full and complete jurisdiction to pass on any claims made under the Equal Pay Act, but I certainly am not going to reach out to assume jurisdiction over a claim which is not made.

The Equal Pay Act, 29 United States Code, Section 2006 (b) (1) [sic] reads as follows:

"No employer having employees subject to any provision of this section shall discriminate within any establishment in which such employees are employed between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays the wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which, requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."

The Bennett Amendment to 42 United States Code, Section 2000 (e) has been, at least by some courts, tied into the Equal Pay Act. It says:

"It shall not be an unlawful employment practice under this subchapter for any employer to differentiate on

the basis of sex in determining the amount of wages or compensation to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 2006 (d) ," which is what I just read.

I suppose that it's self-evident when one thinks about it why the plaintiffs have abandoned the claim under the Equal Pay Act. That Act, to permit recovery, requires discrimination within a particular establishment.

To sue under the Equal Pay Act, then, the plaintiffs would have to say that the City and County of Denver discriminated within its own group of employees, but the entire theory of the plaintiffs' case is in contradiction of that approach.

The entire theory of the plaintiff's case is that the defendant does not discriminate among its own employees, but rather that there is occupational discrimination which has come down through the centuries and that Congress intended that the Courts should take over the restructuring of the economy of the United States of America. Plaintiffs say, and I don't quarrel with this, I make no finding for or against them, but I certainly do not disagree with them, that their skills are such that in a truly egalitarian society, they would receive more money. At least I thought that was true. Until I looked up the word "egalitarianism." I thought the word meant that there should be complete equality among all persons. I thought that it was an economic theory of absolute equality, but I find not. According to Webster, and I cannot help but comment on this, but I do so simply because I think it's slightly humorous, Webster's Seventh New Collegiate Dictionary defines egalitarianism as "A belief in human equality, especially with respect to social, political and economic rights and privileges." So far so good. The next definition is, "A social philosophy advocating the removal of inequalities among *men.*"

Webster's Third International Dictionary defines egalitarianism as "A belief that all *men* are equal in intrinsic worth and are entitled to equal access to the rights and privileges of their society."

I mention that simply to emphasize what we are confronted with here today is history. We're confronted with a history which I have no hesitancy at all in finding has discriminated unfairly and improperly against women. But Congress did not, in my judgment, decide that we were going to roll aside all history and that the Federal Courts should take over the job of leveling out centuries of discrimination. One can go to the Bible and find countless examples of discrimination. To me, the terrifying picture that would be painted if Courts were to get into this situation was best exemplified by Dr. Bardwell in response to a question or two I asked him.

I asked him to accept the assumption, which I believed to be true, that secretaries for the last 70 years have been predominantly female, that secretaries by and large are better trained and more highly skilled than salesmen, and that salesmen are predominantly male. But salesmen make more money. And I asked him if he thought that was sexual discrimination. He said that he did, and that corporations should have to pay secretaries more than salesmen.

So what he is saying is that I should open the Pandora's Box in this case of restructuring the entire economy of the United States of America. I am not going to do it. Some higher Court is going to have to take that step. I don't know how you would ever live with such a program.

The plaintiffs here say they want their pay to be compared with other occupations. Of course they do. If that were done, it would give them more pay. But I can find nothing in the law that requires that. It would be nice for the plaintiffs. It would be completely disruptive of our way of life, and we've got enough disruptions now.

I am unable to believe that the Congress of the United States has mandated that the job of every person in the United States be evaluated skill-wise, productive-wise and otherwise to the job of every other person, and that we have a completely new pay scale set up by some group of experts or pseudo experts. Let me assure you that you could never find any two experts who would be in complete agreement.

And if the Congress thinks that some Bureaucracy should be set up to fix the pay of everybody in the United States, I wish them well the first time they confront George Meany. I will guarantee you that isn't going to work.

I asked, and I was very sincere in my request, that some expert explain to me what one does or the Court is supposed to do when confronted with the impossible problem of trying to determine the relative worth of the services of an unorganized, and by "unorganized" I mean non-union, group, as compared to the negotiated pay of a strongly unionized group. I have no idea how that problem could ever be solved.

I know that if the Court were to order an increase in the pay of the unorganized group, the next round of labor negotiations would use that as a jumping off place. The Courts of this country would be deluged with that type of litigation, and there isn't a Judge in the United States, especially this Judge, qualified to set everybody else's pay. It would be an absolutely hopeless morass.

I have not approached this case without reading a little law here and there. I believe I understand the plaintiffs' position and arguments, and I think that for the sake of the Court of Appeals, I will just tell them what cases I am basically relying on without going into a great deal of detail.

Of course, I have read and studied carefully *McDonnell Douglas v. Green* — I'll come back to that later; *Dayton*

Board of Education v. Brinkman, 433 U.S. 406; *Washington v. Davis,* 426 U.S.229; *General Electric against Gilbert,* 429 U.S. 125; *United Airlines v. Evans,* 431 U.S. 553, which, by the way, as you all know, or many of you know, is a sex discrimination case involving the *United Airlines* stewardesses; *Califano v. Goldfarb,* 430 U.S. 199; *Franks v. Bowman Transportation Company,* 424 U.S. 747; *Albemarle Paper Company v. Moody,* 422 U.S. 406; *Dothard v. Rawlinson,* 433 U.S. 321. I think that's the end of the United States Supreme Court cases. Now — no, we've got *Hazelwood School District* — I want to comment on that — *v. the United States,* 433 U.S. 299; then we have *Muller v. United States Steel,* Tenth Circuit, 509 Fed. 2d. 923; *Hodgson v. Brookhaven Hospital,* 436 Fed. 2d. 719; *Christensen v. the State of Iowa,* 563 Fed. 2d. 353; *Schultz v. Wheaton Glass,* 421 Fed. 2d. 259; *Brennan v. Victoria Bank,* 493 Fed. 2d. 896.

I'm not going to review each of those cases individually, of course, but I am going to say that I can arrive at no conclusion other than that the Congress of the United States and the United States Supreme Court do not foresee that the Courts of this country are going to fix everybody's pay. Neither the Congress of the United States nor the United States Supreme Court, as I read the law, want Judges to run the country in that fashion. And I'll guarantee you I, for one, do not want any part of trying to run the country in that fashion. Because that's not our way of life.

Congress cannot, and never has been able, to repeal the law of supply and demand. And the situation, unfortunate that it may be, is that the supply of nurses is very large as compared to the demand, and it puts the nurses in a somewhat disadvantageous negotiating position. But, the discrimination, as I see it, is not a discrimination in the nursing profession against females.

Plaintiffs' very statistical evidence demonstrates that if there is discrimination within the nursing profession, it is in favor of females because females outnumber males by a tremendous percentage.

The discrimination, to me, must be in other occupations — occupations which nurses have not gotten into. Traditionally, I am convinced they have been discriminated against in the past in those professions. I have found no evidence that they are discriminated against in those professions today.

I don't think that Mr. McDermott would say for a moment that he does not think that history shows discrimination against females in many occupations. I don't think that he would quarrel with that at all. But the discrimination is not present today on the record made in this case. I think the City has done an exceptionally fine job of attempting to establish a fair pay system. I am confident that if we had had 50 experts testify, all 50 of them would have found something in the City system to find fault with. That's part of being an expert. You aren't a fully qualified expert unless you disagree with what some other expert says. The only way you prove your expertise is to refuse to go along.

I might make some changes in the City system, I might not, but I certainly don't think that there has been any showing of discrimination.

I come now to the question of whether *McDonnell v. Green* does or does not apply in a case such as this and I don't know whether it does or whether it doesn't. It was a racial case, of course, as we all know. It was a firing case rather than a pay case. It was a case in which McDonnell Douglas said they fired Mr. Green because he participated in a disruptive demonstration that developed into a minor riot. Mr. Green said that wasn't why they fired him at all: that they fired him because he was black.

The Supreme Court of the United States helpfully said on those facts:

"The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."

I suppose that includes sex discrimination. The opinion continues:

"This may be done by showing (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job which the employer was seeking applicants; (3) that despite his qualifications, he was rejected and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Later they say: "If he proves that, then the burden shifts to the employer to show some legitimate non-discriminatory reason for the employer's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner is assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination."

Then they go ahead and say that the burden shifts back and that Mr. Green can show it was all a pretext. I don't know how you apply that language to this case, but I'll try.

I will say that based upon the statistical evidence which has been here introduced, I think the plaintiffs may have met — no, that they did meet their burden of proof, that there is racial discrimination within the nursing profession. The trouble is they proved that there's discrimination, statistically, in favor of females.

Then I suppose they may have, if you look at it the other way under their theories, they have — I think they have established that, by and large, male-dominated occupations probably pay more for comparable work than is paid in the occupations dominated by females.

I seriously doubt that that establishes any Title VII violation, and I seriously doubt that that establishes any equal pay violation, if that were before me, and I am confident it *does not* establish any Fourteenth Amendment violation.

However, applying this floating burden of proof of *McDonnell Douglas,* I think that if the statistical evidence gets the plaintiffs over the hurdle to shift the burden of proof to the City, the City has clearly picked up the cudgel and demonstrated these things. It has demonstrated it's made a good faith effort to establish a fair pay plan and that as part of it it is paying the prevailing wage as it is required to do under the City Charter.

Let me digress here. I expressly do not find that it is a defense to any type of a discrimination case to say that everybody else is discriminating, so so can I. I totally and completely reject any such fool argument as that, and I don't suggest that the argument has been made.

There is another major problem in trying to apply the plaintiffs' philosophy to this case. Plaintiffs want to structure their pay utilizing a comparison to other occupations, albeit they are male-dominated occupations. I don't think the Congress of the United States intended that equality was to be such a flexible, fluctuating, impossible, imponderable thing as would result from that.

If the plaintiffs be correct in their position, they would be entitled to have their pay fixed by a comparison of their salary with the salaries paid to other occupations. I use, by way of example, because it came up in the testimony,

real estate appraisers. I suppose that exactly – if the plaintiffs are right – exactly the same principles must apply to all hospitals, but I challenge plaintiffs to find me a hospital that has got in its employ a real estate appraiser save and except the City and maybe a few other government hospitals.

So using this as an absurd example, if we were to compare the nurses' pay to real estate appraisers, and if that were to result in an increase in the nurses' pay, their colleagues employed at St. Luke's and St. Joe's would not be entitled to the increase because if this be the way pay is going to be determined, it's going to have to be by comparison within the employer organization, if plaintiffs' theories are followed.

To me the defendants' approach to it is much fairer. Because it might well be that in some organizations plaintiffs' approach would result in a reduction in the pay of the female dominated group, or male dominated group for that matter. And the defendants say, no, this country got where it got – I don't know whether that's good or bad – but it got here by meeting competition. And the defendants say they are going to pay the City nurses in the general range of what the labor market pays them. To me that's a much fairer approach, and I cannot conceive of how a system could work where a group of employees' pay was to be determined by comparison with the other jobs available in that employer's economic structure.

The overall result here, in my judgment, would be absolutely chaos in the economy of the United States of America if any such program ever be adopted. I cannot help but think that the enactment of the Equal Pay Act, which has been rejected by the plaintiffs as a vehicle for relief, is pretty strong proof that Congress does not interpret Title VII, 1983 or the Fourteenth Amendment the way the plaintiffs do. If the plaintiffs are correct in their

interpretation, the Equal Pay Act was really pretty much a waste of time. It wasn't needed. The Equal Pay Act, as I see it, accomplished nothing if plaintiffs are correct. In fact, it probably detracted from the rights available to plaintiffs if they correctly interpret 1983, the Fourteenth Amendment and Title VII.

Let's not forget that the Supreme Court said, in *Washington v. Davis,* at Page 246, "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenge practices. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question."

The Supreme Court did not say that the thing to do was to go out and weigh one job and its skills against another. I don't think that is ever going to become the law in this country. I think that Congress has had every opportunity in the world to come up with that result, and I don't think Congress wants any part of it.

The opinion of the Court in *Hazelwood School District v. the United States,* of course, is very, very important here. Once more, that's 433 U.S. 299. It points out, of course, that originally Title VII applied only to private employers but that it was amended to include public employers. And then it said statistical disparity, particularly when viewed against the background of teacher hiring procedures that *Hazelwood* had followed, was held to constitute a prima facie case of a pattern or practice of racial discrimination. That's why I said I'm willing to accept statis-

tical evidence here that there has been discrimination. But discrimination within the nursing profession has been in favor of women, and I seriously question their standing to challenge discrimination in other occupations if they haven't applied for a job there, and there isn't a scintilla of evidence that they have. However, my views of standing and the United States Court of Appeals for the Tenth Circuit's views of standing seem to differ. I get along pretty well with Judge Breitenstein in the area, but not very well with certain other Judges up there. But be that as it may, I don't think the nurses have a bit of standing to challenge discrimination in any profession other than nursing.

Accordingly, just for the sake of getting the issues squarely before the Court of Appeals, I expressly find and conclude that the plaintiffs have no standing to challenge discrimination on the basis of sex in any profession other than the nursing profession or occupations closely related to the nursing profession on the basis of job requirements. And I find that the nurses have no standing to challenge any discrimination, if there be discrimination, in totally unrelated occupations.

I come now to the case that has been bandied about so much and Counsel seem to read it somewhat differently among themselves. *Ammons v. Zia Company,* 448 Fed. 2d. 117. I note that the *Zia Company* is probably the most prominent litigant in the Tenth Circuit on Title VII matters. I suspect it has had more cases in the Court of Appeals than any other company. Probably because it's almost a Government subsidiary, I guess. The only one I know of which hasn't been decided by the Court of Appeals yet is one I tried in New Mexico, so I'm waiting with bated breath for that one.

Anyway, in *Ammons v. the Zia Company,* the opinion was written by Judge Aldisert of the Third Circuit sitting by designation. The Court was composed of Judge Aldisert,

Judge Breitenstein and Judge Barrett. It seems to me the Tenth Circuit has pretty squarely passed upon the problem of the Bennett Amendment and Title VII and the interrelationship between the Bennett Amendment and Title VII. Let me quote from Page 120 of the *Ammons v. Zia* opinion. "Moreover, to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work. Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they be substantially equal", citing *Schultz v. Wheaton Glass.* "Thus, in the instant case, appellant was obliged to demonstrate that the work performed by the three higher paid male workers was 'substantially equal' to that performed by her." I full well understand that Mr. Barnes says that that applies only in a one on one situation, but that's something the Court of Appeals is going to have to instruct me on.

I expressly find that the plaintiffs failed to prove any pay differential based on sex for the performance of substantially equal work. This was clearly available to them under the Equal Pay Act and they elected not to follow it, for reasons I can understand. But if their position is that they did try to prove it, I find there was a total failure of proof. And indeed there must be. If we are to follow the plaintiffs' theory, what is the Court supposed to do when deciding on the equality of pay of doctors and lawyers? The doctor's education is a little bit longer than a lawyer's, but as to the lawyers who have been law clerks, it really isn't. Both are licensed. Lawyers can advertise. Maybe doctors can pretty soon, I don't know. But I think a statistical study will show that doctors make a lot more money than lawyers. And there are probably two reasons for that. One is a more tightly controlled union which sets up the limitations on education. And the other one is the ever-present threat of malpractice litigation which struck the doctors first but is

rapidly catching up with the lawyers. Malpractice litigation which has tended to price medical services out of sight, and legal services are soon going to follow.

Going back to the *Ammons* case, Judge Aldisert continued:

"Congress did not intend that a naked averment of job discrimination would suffice to establish a prima facie case under the Equal Pay Act. It required factual support of an accusation that the employer paid the aggrieved employees of the opposite sex in such establishment for equal work, on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."

That, of course, was under the Equal Pay Act. That claim has been abandoned, but insofar as the Equal Pay Act is incorporated into Title VII, I find that there was a total failure of proof on the part of plaintiffs.

Hodgeson v. Brookhaven Hospital, of course, we are most familiar with. That was the case decided by Judge Sarah Hughes. Let me read from the — I mean a lower court decision by Judge Sarah Hughes. Let me read from Judge Ainsworth's opinion in that case.

"At the close of the testimony, the trial judge had before her evidence which, if credited, indicated that even the least experienced aides and orderlies were called on from time to time to perform duties beyond the ambit of routine patient care. She had to determine whether those duties were distributed evenly among all aides and all orderlies so as to warrant comparison of aides and orderlies as classes. And, if so, whether as a class the work of the aides was substantially equal to that of the orderlies in terms of skill, effort, and responsibility.

"Focusing simply on the individual tasks performed over and above routine patient care, it seems clear that

the trial judge was justified in finding, in effect, that those tasks performed only by aides require as much skill as the most skilled tasks performed by orderlies, and that the additional duties assigned to both groups involved substantially equal responsibility.

"The validity of the judgment thus depends on the application of the equal effort criteria."

I find that in this case, in so far as it is appropriate, that there is no substantial evidence that the tasks performed by any other group, either as regular or as additional duties, involves substantially equal responsibility with those of the nurses.

I do not find that there has been any discrimination at all between occupations performing substantially equal work, and I totally reject the concept that one can compare the job skills, the professional skills and the responsibilities of the nursing profession with the administrative skills of some totally unrelated group. There is no expert in the United States of America who can create anything other than consternation if this ever be attempted.

It seems to me that *Christensen v. State of Iowa* by the Eighth Circuit, not yet a year old, 563 F.2d 353, is pretty close to this point, and I'm inclined to think that the reasoning of Judge Bright, joined in by Judge Lay and Miller, is, I think, unanswerable.

There, of course, the plaintiffs were employed by the University of Northern Iowa. Quoting from the opinion:

"The University of Northern Iowa contends, and the district court agreed, that appellants did not establish entitlement to relief under Title VII because appellants failed to show that work performed by clerical employees was substantially similar to that performed by physical plant employees."

I interject, here we have got exactly the same thing. We are trying to compare one type of occupation with another.

"UNI claims that the last sentence of 42 United States Code, Section 2000 (e) – (h), commonly known as the Bennett Amendment, requires a showing of 'equal work' in terms of sex discrimination in compensation. Appellants contend that the Bennett Amendment does not place this limitation on Title VII.

"We need not resolve the conflict presented over the interpretation of the Bennett Amendment for we are convinced that, apart from the Bennett Amendment, appellants failed to make a prima facie case.

"Appellants have failed to demonstrate that the differences in wages paid to clerical and plant employees rested upon sex discrimination and not on some other legitimate reason."

I interrupt, I expressly find that the plaintiffs here have failed to demonstrate that the difference in wages paid to the nurses and paid to unrelated occupations, whether they be male-dominated, female-dominated, or of equal mix, I expressly find that there has been no showing of any differences based directly or indirectly on sex discrimination, save and except as history has created a lower pay scale for certain occupations.

I expressly find that the City has not excluded any male from the profession of nursing based upon sex, and I expressly find that the City has not excluded any female from any other occupation based upon sex, and I expressly find that the City has made no determination as to the wages of any group based upon sex.

Continuing with the case – wait a minute, I've got to get that one last clause in that case.

I expressly find that the City fixed its wages based upon a conclusively demonstrated legitimate reason, namely, meeting competition.

I expressly find that if the City's competitors were to raise the salaries of nurses, I have no doubt at all that the City would raise the salaries of nurses because they would have to.

Now I'll read from the case:

"The evidence shows that UNI paid higher wages to plant workers because wages for similar jobs in the local market than the wages established under the Hayes System."

I think I've already found the essential facts on that.

"The University drew no distinction between male and females in the plant department."

I have already found that the City draws no distinction between male and female employees.

"Appellants contend that UNI's policy violates Title VII by perpetuating wage differences resulting from past discrimination."

The precise contention made by plaintiffs here.

"They argue that long-standing discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an over supply of workers and depressed wages in those jobs."

Exactly the same contention as that made here.

"Therefore, UNI's reliance in part upon prevailing wage rates and determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college."

The precise contention that is made here.

"This argument misconstrues the purposes of Title VII. The federal policy embodied in Title VII is that individuals shall be entitled to equal opportunities in employment on the basis of fitness and without discrimination because of race, color, religion, sex or national origin."

I expressly find that the City does afford the plaintiffs and all other females equal opportunities in employment on the basis of fitness and without discrimination because of race, color, religion, sex, or national origin. I find no credible evidence in the case to the contrary.

"This policy," I continue, "is reflected in the statute's title 'Equal Employment Opportunity' as well as in the preamble to Executive Order No. 11478, its counterpart in the area of federal employment."

Then they quote from that: "It has long been the policy of the United States government to provide equal opportunity in federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin.

"The policy behind Title VII was described by the Supreme Court in *Griggs v. Duke Power Company,* 401 U.S. 424," and they quote: "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

"The court reiterated that policy in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792," and they quote: "The language of Title VII makes plain the purpose of Congress to assure quality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."

The quality of opportunity is not at issue here. Instead, appellants seek a construction of Title VII that may establish a prima facie violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."

I interject that is the exact contention here made.

"Appellants' theory ignores economic realities."

I interject that plaintiffs' theory ignores economic realities.

"The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."

I find that the City's key class system was set up in absolute good faith. I am sure that if anyone were to set up a key class system, it would be subject to attack. The attacks have been made on the City's system. I find nothing inherently wrong with the City's key class system. I find that it was done after careful study and thought and evaluation by experts in the field. I find that the criticism which is made of it is totally insufficient to in any way affect its validity. I find that the City, in setting up its system, in good faith attempted to fix wages for genuinely different work classifications.

I think that to structure the classification system in the way plaintiffs seek to structure it would be unrealistic, and although it might help them, any such policy would result in more damage in the long run than it would help. If we are to have, in this country, the legendary 1984 as expressed in the book, the Big Brother looking over our shoulder who is going to dictate our day-to-day ways of life, it's going to have to come from the Congress. It's not going to come, at least, from this Court. I'm a great believer in preventing discrimination, whether it be based on sex, race, color or religion. But I don't find any such discrimination here of a current date.

I have said, and I repeat, historically there has been discrimination against females. I condemn it. It's wrong. But Congress has not seen fit to try to bring it all down to date. And Congress has not said that the Courts are supposed to correct all of history. The Courts aren't qualified to do it, the Courts ought to stay out of it. And if history is that bad, the plaintiffs should direct their appeals to the Legislature, the Congress. Perhaps Congressional people are smart enough to solve it. I'm surely not.

I don't think plaintiffs have proven any grounds for relief in this case, and accordingly, the Clerk shall prepare a judgment denying plaintiffs' relief. Contrary to the expressed provisions of the rule, and in accordance with what I have said earlier, this judgment should be prepared forthwith as the rule says, but it is not to be signed forthwith. It is to be signed by the Clerk contemporaneously with my signing of the Reporter's transcript of these oral findings and conclusions. Literal compliance with the rule, I'm afraid, would give the plaintiffs complications on when the time for appeal runs. And I certainly don't want to do that.

Appendix A

Opinion of the Court of Appeals
(Decided April 21, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

April, 1980, Term

No. 78-1499

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

against

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, Vice-Chairperson, Career Service Board, RICHARD L. HARTMAN, member of the Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado

This is an action brought by several nurses who were employed by the City of Denver. The suit against the City seeks relief for sex discrimination under the Civil Rights Act, under 42 U.S.C. § 1983, and the fourteenth amendment. As it reaches us this is not an equal pay case, 29 U.S.C. § 206(d), A class was certified. The trial court found for the defendant City.

The challenge is to the City classification and pay plan (which covers all its employees) as it applies to plaintiffs. The plan seeks to equalize the pay for City employees with pay for like jobs in the community. The City has established hundreds of job classifications with written descriptions. Among these are "key classes" which are selected because they can be accurately compared with non-City positions, and also City jobs which are useful and significant within the City classifications to evaluate the comparisons so made with the outside jobs. The key classes include "Graduate Nurse I," and "Licensed Practical Nurse I." Key classes are "surveyed" each year to make the comparison with what is going on in the community.

The application of the City method places the City nurses on a pay parity with other nurses in the community. The consequences are the same for all other City classifications.

The basic position of plaintiffs is that they do not want the comparison to be with nurses in the community. They argue that historically nurses have been underpaid because their work has not been properly recognized and because nurses have almost universally been women. Thus the plaintiffs urge that the City should not mirror this condition which prevails in the community and so perpetuate it in the City employment practices. Since the City does

follow the community scale they argue that this discrimination is incorporated in the City's plan. Plaintiffs thus assert that their positions should instead be compared with jobs other than nurses. This, they urge, should be accomplished by placing them in a different City classification described as "General Administrative Series." Under their analysis, this would remedy the situation by making the comparison with non-nursing positions.

In summary, the suit is based on the proposition that nurses are underpaid in City positions, and in the community, in comparison with other and different jobs which they assert are of equal worth to the employer. The relationship of pay for nurses to pay for other positions is obviously a product of past attitudes, practices, and perhaps of supply and demand. The record shows that it became a part of the economic balance and relationships prevailing in the community among the myriad of positions in the job market.

This type of disparity was not sought to be adjusted by the Civil Rights Act, and is not within the equal protection clause. The courts under existing authority cannot require the City within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship. Also, this cannot be done in total disregard of conditions in the community. The court in Christensen v. State of Iowa, 563 F.2d 353 (8th Cir.), said of this: "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."

It thus appears that the plaintiffs are seeking relief far beyond that contemplated by Congress or the Constitution. It is clear that the Denver City officials acted in good faith. The trial court so found and found also that "the City draws no distinction between male and female employees." Plaintiffs are not seeking equality of opportunity in their

skills as contemplated by Title VII, and described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it.

In the meantime, we can consider *wage* discrimination claims which involve departures from equal pay for equal work. This would be applicable to both the Equal Pay Act and Title VII. We applied the "equal work" concept to Title VII in Ammons v. Zia Company, 448 F.2d 117 (10th Cir.) The equal pay for "comparable work" concept had been rejected by Congress in favor of "equal work" in 1962. The Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act. Our Ammons v. Zia Company, 448 F.2d 117 (10th Cir.), was a 1971 sex discrimination decision under Title VII of the 1964 Act, 42 U.S.C. § 2000e. We there said: "Moreover, to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work." The plaintiffs are not seeking relief within this concept, and are instead well beyond the limits there describd.

The case before us is much like Christensen v. State of Iowa, 563 F.2d 353 (8th Cir.), the opinion which was quoted by the trial court at some length. There, a comparison and equality was sought between women clerical employees at a university with employees in its physical plant department. The same arguments were made there as in the case before us, including the perpetuation of discrimination existing in the market. The Eighth Circuit held that no cause of action had been established and indicated the theory was far beyond the existing statutory law and the application of constitutional provisions.

The Supreme Court has always emphasized the barriers to employment opportunities, and the necessity to provide equal employment opportunities. This after all is the purpose of the legislation. *See again* McDonnell Douglas Corp. v. Green, 411 U.S. 792, and Griggs v. Duke Power Co., 401 U.S. 424.

The plaintiffs did not show that the work in the classification they sought was equal to that in which they found themselves. The only showing was that the City's system of pay and classification provided equal pay for equal work. The proof demonstrated that the City provided equal opportunities for women including plaintiffs and the class. The parity plaintiffs seek is not a remedy which the courts can now provide.

AFFIRMED.